

DISTRICT COURT OF APPEAL OF FLORIDA  
SECOND DISTRICT

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SYLVESTER DUPREE HARDEN, JR.,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

No. 2D20-2936

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November 10, 2021

Appeal from the Circuit Court for Polk County; Donald G. Jacobsen,  
Judge.

Howard L. Dimmig, II, Public Defender, and Julius J. Aulisio,  
Assistant Public Defender, Bartow, for Appellant.

Ashley Moody, Attorney General, Tallahassee, and C. Todd  
Chapman, Assistant Attorney General, Tampa, for Appellee.

PER CURIAM.

Sylvester Dupree Harden, Jr., appeals his judgment and  
sentence for one count of unlawful sexual activity with a minor. We

affirm Mr. Harden's judgment and sentence in all respects, but we remand to the trial court for entry of a corrected scoresheet.

Mr. Harden was sentenced to sixty months in prison followed by 120 months' probation pursuant to a negotiated plea agreement in exchange for the second and third counts of unlawful sexual activity with a minor with which he was charged being nolle prossed. Mr. Harden's sentencing guideline scoresheet reflected eighty victim injury points for penetration. Because Mr. Harden pled to a charge that alleged union and/or penetration, victim injury points for penetration could not be assessed absent a specific finding of penetration or Mr. Harden stipulating to the fact of penetration. *See Alexis v. State*, 258 So. 3d 471, 472–73 (Fla. 4th DCA 2018) ("When a defendant pleads to an offense that does not require proof of sexual penetration as charged, victim injury points for penetration cannot be assessed unless the defendant stipulates that penetration occurred or agrees to inclusion of the points as part of a plea bargain."); *Mann v. State*, 974 So. 2d 552, 554 (Fla. 5th DCA 2008) ("[W]hen the information charges penetration or union, the assessment of victim penetration points is error absent a specific finding that penetration occurred."). Neither occurred here.

As a result, Mr. Harden's scoresheet was incorrectly calculated. See *Alexis*, 258 So. 3d at 473; *Blair v. State*, 201 So. 3d 800, 803 (Fla. 4th DCA 2016); *Hatten v. State*, 143 So. 3d 1103, 1105 & n.2 (Fla. 5th DCA 2014); *Mann*, 974 So. 2d at 554.

Mr. Harden is not entitled to resentencing, however, because the record conclusively shows that the trial court would have imposed the same sentence regardless of the scoresheet error. See *Sanders v. State*, 35 So. 3d 864, 870–71 (Fla. 2010) ("When a scoresheet error is challenged on direct appeal, . . . the error 'is harmless if the record conclusively shows that the trial court *would have imposed* the same sentence using a correct scoresheet.' " (quoting *Brooks v. State*, 969 So. 2d 238, 241 (Fla. 2007))); *Henion v. State*, 247 So. 3d 537, 538 (Fla. 4th DCA 2018) ("While we agree that the scoresheet was incorrectly calculated, we find that sentencing was proper because the record shows that the trial judge would have imposed the same sentence on appellant regardless of the scoresheet error. Thus, we affirm appellant's sentence but remand to the trial court for the entry of a properly calculated scoresheet."). Accordingly, we affirm Mr. Harden's sentence but remand to the trial court for the entry of a properly

calculated scoresheet. Mr. Harden need not be present for the purposes of correcting the scoresheet on remand. *See Harmon v. State*, 284 So. 3d 1080, 1081 (Fla. 4th DCA 2019).

Affirmed; remanded with directions.

MORRIS, C.J., and SLEET and LUCAS, JJ., Concur.

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Opinion subject to revision prior to official publication.